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Cambridge Electric Light Company,)	
Commonwealth Electric Company, Boston)	D.T.E. 03-47
Edison Company,)	
NSTAR Gas Company, d/b/a NSTAR)	
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I. INTRODUCTION

¹ The Department explicitly denied the Company the opportunity to recover pension and PBOP costs in excess of those amounts recovered in rates during the four year rate freeze accompanying the merger that formed NSTAR. Order, pp. 31-33 *citing* NSTAR, D.T.E. 99-19 (1999). The Attorney General has filed a motion for clarification on the rate freeze issue to determine the extent of the time period for this exclusion, not on whether the Department lawfully decided this issue.

II. ARGUMENT

A. Exogenous Costs

1. The Department Correctly Found That Costs Were Not Exogenous; NSTAR Had Adequate Notice Of This Issue.

NSTAR argues that the Department committed error warranting reconsideration of its decision on exogenous costs, re-opening of the record or another proceeding on this issue.

Motion, pp. 9-11. The Company claims that the Department denied it due process because it did not give notice that exogenous costs would be an issue, stating:

The record is silent on this issue which was *never raised by any party in this case*. . . . This case suffers from a worse infirmity -- not only did the case not raise the relevant issues on this critical finding, but *no party even briefed the issue [of exogenous costs]*.

Motion, p. 10, n.6 (emphasis added). These statements are erroneous. The Attorney General expressly raised the issue of exogenous costs in his June 5, 2003, motion to dismiss:

Changes to pension and PBOP expense *do not qualify as an exogenous cost* under the merger rate plan since the drop in the stock market that prompted NSTAR's petition did not "uniquely effect" the electric or gas distribution industry. *NSTAR*, D.T.E. 99-19, p. 35. The recent stock market volatility has effected every company pension fund, even if their structures have borne the impact in different ways. Furthermore, NSTAR requested the accounting deferral; the deferral was not "actually beyond" the Company's control.

Motion to Dismiss, p. 6, n.5 (emphasis added) . The Company filed an opposition to this motion and chose not to respond to the argument. Since the Attorney General filed this motion before the procedural conference, discovery period and hearings in this case, NSTAR had every opportunity to litigate the issue of exogenous costs, but did not.

In his August 19, 2003, Initial Brief the Attorney General argued against the Department deeming the Company's petition as a request for exogenous cost recovery from the rate freeze:

The new pension benefit *reconciliation mechanism does not qualify as an exogenous cost* under the merger rate plan since the drop in the stock market which largely prompted NSTAR's petition did not "uniquely effect" the electric and gas distribution industry. *NSTAR*, D.T.E. 99-19, p. at 35. Every company pension fund is structured differently and has been effected by the recent stock market volatility in different ways.

* * *

Under Department precedent, moreover, a utility may not defer a cost during the period covered by a rate settlement that fixes rates unless specifically allowed by the terms of the agreement. *North Attleboro Gas*, D.P.U. 93-229, p. 6 (1993) (denial of deferral request since expense occurred during period of settlement and *expense did not qualify as an exogenous cost*).

AG I.Br., pp. 17-18 (emphasis added). NSTAR choose not to address these arguments in its Reply Brief, and now should not complain of a lack of notice on this issue.

NSTAR had the burden to demonstrate that the costs from the rate freeze period were recoverable from customers. It did not carry its burden. The Department should deny reconsideration where the Company failed to address, until an adverse decision on the matter by the Department, an issue that the Attorney General raised in a pre-hearing Motion To Dismiss and that was plainly inherent in the Company's own request for regulatory treatment of pension and PBOP expenses.

2. The Department's Based Its Decision On Exogenous Costs On Substantial Evidence.

The Company argues that the Department lacked substantial evidence to support its conclusion that the increased pension and PBOP costs are not recoverable as exogenous costs. Motion, pp. 9-10. The Department prescribed the legal test for an exogenous cost for NSTAR in the merger rate freeze order:

The Joint Petitioners [NSTAR] proposed not to raise any of Boston Edison's, Cambridge Electric's, ComElectric's, and ComGas' distribution rates for four years following the consummation of the merger, unless exogenous factors result in cost changes (Exh. RDW-1, at 9). The Joint Petitioners define exogenous costs as *changes* in tax laws, *in accounting principles*, and in regulatory, judicial, or legislative requirements.

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The Joint Petitioners' [NSTAR] proposed list of exogenous factors is identical to that set forth and accepted by the Department in *NIPSCO-Bay State Acquisition*, D.T.E. 98-31 (1998), *Eastern-Essex Acquisition*, D.T.E. 98-27 (1998), and *Boston Gas Company*, D.P.U. 96-50 (1996). For purposes of the Rate Plan, exogenous factors shall be defined, for Boston Edison, Cambridge Electric, and ComElectric, as those positive or negative cost changes actually beyond the Joint Petitioners' control that *uniquely affect the electric distribution industry*. For ComGas, exogenous factors shall be those positive or negative cost changes actually beyond the Joint Petitioners' control that *uniquely affect the local gas distribution industry*.

NSTAR, D.T.E. 99-19, pp. 13, 25 (emphasis added). NSTAR itself proposed this list of exogenous factors, including accounting principles, that the Department adopted in all the other mergers it approved in the late 1990s.

Substantial record evidence supports the facts that 1) generally-applicable accounting rules had changed and 2) recent general stock market and interest rate decline had affected the Company's pension and PBOPs expense obligations. *See e.g.*, Exh. NSTAR-JJJ, pp. 10-11, 16. From these facts the Department could reasonably find that the accounting rules generally applied to all companies, including the various types of utilities under its regulation: telecommunications, water, transportation, gas and electric companies. In the exercise of its general accounting and financial expertise, the Department also could rationally conclude that recent stock and financial markets events affected the pension funds of other companies. *See also* Exh. NSTAR-JJJ-3 (December 2002, cover letter of Bernard Peloquin). Thus, the Department

was justified in concluding that the circumstances that caused NSTAR to petition the Department for rate relief did not uniquely affect the gas or electric industries.² In the circumstances of this case, substantial evidence supported the Department's ultimate finding that the pension and PBOP costs were not exogenous to the NSTAR rate freeze. *Boston Gas Company v. Department of Telecommunications and Energy*, 436 Mass. 233, 238 (2002) ("An agency's findings are supported by substantial evidence if they 'could have been made by reference to the logic of experience.'")

B. The Department Appropriately Denied Costs Incurred During The Rate Freeze Even When It Allowed Deferral.

The Company argues that the rate freeze accompanying the NSTAR merger did not include the costs for increased pension and PBOP expenses that the Company now seeks to recover. Motion, pp. 4-6. The Company based this conclusion primarily on three factors: 1) the Department's August 7, 2003, interlocutory order on Motion to Dismiss, 2) the purported lack of evidence for the type of costs contained within the merger rate freeze, and 3) the accounting deferral approval in D.T.E. 02-78. None of these arguments merit reconsideration of the Order.

First, the Department's interlocutory order held that the existence of the rate freeze did not prevent the Company from simply filing a petition for rate relief to become effective after the

² The Company argues that the Department should eliminate the "uniqueness" factor from the exogenous cost test in the NSTAR merger case because it is a concept borrowed from price cap plans and inappropriate in a merger context. Motion, p. 10, n.5. This argument comes too late. If the Company was dissatisfied with the elements of this test, NSTAR should have directly challenged the merger order through an appeal in 1999, rather than seeking a collateral attack on the order after enjoying the benefits of the merger rate freeze for four years. Furthermore, there is nothing illogical about the Department retaining this limitation on exogenous cost recovery in the context of a merger rate freeze. The Department balanced competing customer and Company interests in its "no net harm" analysis when it approved the NSTAR merger and permitted the Company to retain the merger-related savings during the rate freeze period while it shielded customers from rate increases. The Department should not let the Company now tip this balance in its favor by diminishing customer protections.

expiration of the freeze period. *Interlocutory Order on Motion to Dismiss*, D.T.E. 03-47, p. 10 (August 7, 2003). The Department did not find that the Company's petition complied with the terms of the rate freeze. The Attorney General had argued in his motion to dismiss that the May, 2003 effective dates on the tariffs filed with the Company's petition came within the freeze period and could not be effective. In denying the motion, the Department responded by noting that the first increase in rates through the new tariffs would not occur until January, 2004, after the end of the freeze.

Second, the record evidence abundantly supports the conclusion that pension and PBOP expenses are the types of costs covered by the terms of the merger rate freeze. As the Company itself observes, the merger rate plan covers base rates. Pension and PBOP costs are base rate items.

Third, the deferral did not automatically mean the Company could recover the pension and PBOP expenses. The Company argues that its pension reconciliation mechanism "gave effect" to the Department's accounting deferral order in D.T.E. 02-78 and transforms costs incurred during the rate freeze period into a recoverable expense. Motion, p. 2. Deferral of an unrecoverable cost, however, does not make that cost recoverable. *See North Attleboro Gas*, D.P.U. 93-229, p. 1, n.1 ("A deferral of an expense allows a company *to request recovery* for that expense in the company's next rate case even though that expense was incurred before the test year chosen by the company." (emphasis added)). As the Department noted in its letter accompanying action on the Company's 2002 request for a deferral: "[T]he Department's approval of the Company's request does not predetermine the mechanism for establishing the amount of pension and PBOP costs that would be included in rates" *NSTAR Electric and*

Gas Company, D.T.E. 02-78 (2002) (general counsel's letter date December 20, 2002).

III. CONCLUSION

For the reasons stated above, the Department should deny the Company's motion for reconsideration.

Respectfully Submitted,

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